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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 512th MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 16 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

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The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued)

Consideration of draft Model Law on Procurement (continued)

Report of the drafting group (continued) (A/CN.9/XXVI/CRP.4)

1. The CHAIRMAN invited the Commission to continue its consideration of the amendments to the draft Model Law proposed by the drafting group in its report (A/CN.9/XXVI/CRP.4). Article 6 would be left aside for the time being.

Commentary on article 7, paragraph 1

2. The amendment proposed by the drafting group was adopted.

Commentary on article 7, paragraph 2

3. The additional text proposed was adopted.

Commentary on article 7, paragraph 3, chapeau

4. The proposed text was adopted.

Commentary on article 7, paragraph 4

5. The proposed text was adopted.

Commentary on article 7, paragraph 5

6. The proposed amendment was adopted.

Commentary on article 7, paragraph 8

7. Ms. CLIFT (Observer for Australia) suggested that, at the end of the proposed new text, the words "to the satisfaction of the procuring entity" be added. That would make the meaning clearer.

8. The CHAIRMAN took it that the Commission wished to adopt the new text for paragraph 8 with the amendment suggested by the observer for Australia.

9. It was so decided.

Commentary on article 9, paragraph 1

10. The proposed amendment was adopted.

Commentary on article 9, paragraph 2

11. The CHAIRMAN took it that the Commission wished to correct the reference to take into account the proposed deletion of paragraph 18 (3) and its replacement by new text.

12. It was so decided.

13. The CHAIRMAN said that consideration of the drafting group's report would continue at the next meeting.

Consideration of the draft Guide to Enactment (continued) (A/CN.9/375)

14. The CHAIRMAN drawing attention to the commentary on article 11, took it that the Commission wished to adopt the text on the understanding that the Secretariat would make any necessary changes to reflect relevant decisions of the Commission.

15. It was so decided.

16. Ms. CRISTEA (Observer for Romania) said that comments would presumably be needed on the proposed new article 11 bis.

17. Mr. WALLACE (United States of America), referring to the commentary on article 12, said that it was not clear from the last sentence of paragraph 1 whether the Commission expected that the enacting State would already have an effective system of sanctions against corruption in place, or whether the State was being urged to put such a system in place. Perhaps the text should be amended to say that the State would have an effective system of sanctions in place elsewhere.

18. Mr. TUVAYANOND (Thailand) suggested that the text should also mention the prevention of corruption by personnel of public enterprises responsible for procurement.

19. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 12 on the understanding that the Secretariat would incorporate the changes suggested.

20. It was so decided.

21. Mr. WALLACE (United States of America), referring to the commentary on article 13, said that it should be made clearer, either at that point in the Guide or in the Introduction (paragraph 11), that the Working Group had decided it did not wish to create a hierarchy of procurement methods and that the Commission had a strong preference for tendering proceedings. The great importance of keeping records should be emphasized.

22. In order to ensure that the various procurement methods were understood, explanations should be provided in the Guide and the reasons for decisions relating thereto in the Model Law should be explained.

23. Mr. JAMES (United Kingdom) supported the views of the representative of the United States. In particular, he considered that maximizing economy and efficiency was not the only reason for using tendering proceedings. There should be a reference to the principles contained in the Preamble, and to the fact that tendering best met the requirements of those principles.

24. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 13 on the understanding that the Secretariat would take into

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account the comments of the representatives of the United States of America and the United Kingdom.

25. It was so decided.

26. Mr. FRIES (United States of America), referring to the commentary on article 14, noted the words "the case in which the procuring entity is unable to formulate specifications". Perhaps it should be pointed out that a procuring entity could, if it were not capable of drafting specifications itself, engage experts to do so. That would serve to reinforce the preference for tendering proceedings.

27. Mr. TUVAYANOND (Thailand) suggested that the wording "it is not feasible for the procuring entity to formulate specifications" be used rather than "the procuring entity is unable to ...".

28. The CHAIRMAN took it that the Commission wished to adopt the commentary on article 14 on the understanding that the comments of the representatives of the United States of America and Thailand would be taken into account by the Secretariat.

29. It was so decided.

30. The CHAIRMAN drew attention to the commentaries on articles 15, 16 and 17 and took it that the Commission wished to adopt them.

31. It was so decided.

32. Mr. WALLACE (United States of America), referring to the commentary on article 18, noted that the second sentence of paragraph 1 implied that the procurement law would specify the publications that interested suppliers and contractors should employ. He wondered whether that was likely or indeed whether it would be wise. In the last sentence of paragraph 3, he thought that the suggestion that restricted tendering was appropriate where high-value goods or construction were involved was unfortunate. That example would serve better as an example of circumstances making prequalification desirable.

33. The CHAIRMAN said that the Secretariat would take into account those comments. He took it that the Commission wished to adopt the commentary on article 18 on that understanding.

34. It was so decided.

35. The CHAIRMAN drew attention to the commentary on article 19 and took it that the Commission wished to adopt it.

36. It was so decided.

37. After a brief discussion on the commentary on article 20, the CHAIRMAN said that the Secretariat would make sure that the terminology used in reference to costs of "printing and providing" documents was aligned with the

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Commission's decisions. On that understanding, he took it that the Commission wished to adopt the commentary on article 20.

38. It was so decided.

39. The CHAIRMAN drew attention to the commentary on article 21 and took it that the Commission wished to adopt it.

40. It was so decided.

41. The CHAIRMAN invited comments on the commentary on article 22.

42. Mr. WALLACE (United States of America) asked whether the title of the article was to be changed. He thought that the emphasis was now to be placed on ensuring objectivity and non-discrimination.

43. Regarding the last sentence of paragraph 1, he thought that the argument was unclear and that the sentence should perhaps be recast or deleted.

44. Mr. SAHAYDACHNY (Secretariat) reported that the drafting group had agreed on a shorter title for article 22.

45. Ms. ZIMMERMAN (Canada), referring to paragraph 3, said that the argument put forward in that paragraph seemed to be that, in the case of bilingual documents, suppliers and contractors would have to ascertain that the two language versions were identical. In Canada, both English and French were official languages and solicitation documents would normally be issued in English and French, but that did not mean that the supplier must compare the versions. He could submit the tender in either language. Her delegation took exception to the text of paragraph 3.

46. Mr. KINGA (Cameroon) said that English and French were also official languages in his country. He could not accept the view that the two language versions should not form a single publication. There was no need for contractors to compare the two versions.

47. Mr. MORAN BOVIO (Spain) suggested that it should be made clear that the point made would not apply when the languages concerned were official languages of the country. The Secretariat could undoubtedly find a satisfactory wording for the text.

48. Mr. TUVAYANOND (Thailand) thought that it could be made clear in the solicitation documents in such cases that both language versions were equally authoritative. A reference should perhaps also be made to the need to use a language that was normally used in international trade.

49. Mr. WALLACE (United States of America) said he thought that the draft Model Law adequately took care of the language point in articles 22 (4) and 24. When there were several language versions, the main point was that the tenderer would be fully protected if he based himself on one language version without reference to the others.

50. Mr. LEVY (Canada) suggested that the reference to the need for different language versions to be independent of each other should be deleted.

51. Mr. GRUSSMANN (Austria) supported that suggestion. In any case, he believed that the relevant clause in the draft Model Law would now be not in article 22 but rather in a new article 12 ter.

52. The CHAIRMAN said he thought that there was no need to add anything to paragraph 3. It could be redrafted and the reference to language versions having to be independent could be deleted. The last sentence of paragraph 1 could also be redrafted to give the correct meaning.

53. Mr. WALLACE (United States of America) noted that, to take into account the points raised, it would be necessary also to have another look at the fourth sentence of paragraph 3.

54. The CHAIRMAN suggested that the commentary on article 22 be adopted subject to amendments to take into account the points raised.

55. It was so decided.

56. The CHAIRMAN invited comments on the commentary on article 23.

57. Mr. WALLACE (United States of America) thought that, in the second sentence of paragraph 1, the words "fundamental and necessary" were too strong. He suggested that they be replaced by the word "important".

58. It was so agreed.

59. The CHAIRMAN said he took it that the commentary on article 23 was adopted as amended.

60. It was so decided.

61. The CHAIRMAN invited comments on the commentary on article 24.

62. Mr. TUVAYANOND (Thailand) thought that it would be useful to state that documents should be in a language normally used in international trade.

63. The CHAIRMAN said that the drafting group was proposing that there be a new article 12 ter in the Model Law providing for documents to be issued in a language chosen by the State concerned and in a language customarily used in international trade. If he heard no objection, he would take it that the commentary on article 24 was adopted and that the comment made would be taken into account.

64. It was so decided.

65. The CHAIRMAN invited comments on the commentary on article 25.

66. Mr. FRIES (United States of America) said that the last sentence of paragraph 3 was no longer in line with what the Commission had decided in relation to electronic data interchange (EDI) techniques. With regard to

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paragraph 4, he did not think that a recommendation such as that in the last sentence should be made, since no decision had been taken by the Commission on that point.

67. The CHAIRMAN said that he thought that the last sentence of paragraph 3 should be deleted.

68. Mr. PHUA (Singapore) said that paragraph 2 should include the point that a decision of the procuring entity to extend the submission deadline would not be subject to review under chapter V of the Model Law. He recalled that the text of article 25 (3) had been amended on the proposal of the Australian delegation and that it had been agreed that the point raised should be mentioned in the Guide.

69. After some discussion as to what the Commission's decision had been, Ms. ZIMMERMAN (Canada) said that, according to her notes, it had been suggested that the Guide should mention that the exercise of discretion by the procuring entity in the case under discussion would not be subject to review.

70. The CHAIRMAN said that it seemed reasonable that a discretionary decision could not be subject to review. The Guide would reflect that point. He took it that, subject to the points raised, the commentary on article 25 could be adopted.

71. It was so decided.

72. The CHAIRMAN said that, if he heard no comments on the commentary on article 26, he would take it as adopted.

73. It was so decided.

74. The CHAIRMAN invited comments on the commentary on article 27.

75. Mr. WALLACE (United States of America), referring to paragraph 1, said he thought that the words "at least a portion of" in the second sentence were rather weak and that the drafting could perhaps be looked at. Paragraph 6 would need to be revised to take into account the Commission's decision on the relevant paragraph of the Model Law. In the second sentence of paragraph 6, a better term could perhaps be found than "transferable", which suggested a reference to foreign exchange controls.

76. The CHAIRMAN said that those points would be taken into account. Subject to those points, he took it that the Commission could adopt the commentary on article 27.

77. It was so decided.

78. The CHAIRMAN drew attention to the commentary on article 28 and said that, if he heard no objection, he would take it as adopted.

79. It was so decided.

80. The CHAIRMAN invited comments on the commentary on article 29.

81. Mr. WALLACE (United States of America), referring to paragraph 5, noted that the second, bracketed sentence of that paragraph referred the reader to paragraph 4 (presumably it should be paragraph 2) of the comments under article 8 concerning "the advantages" of using a margin of preference. His delegation would find the expression "factors involved in" more acceptable than "advantages of".

82. In paragraph 6, he suggested that the details given in the last sentence of possible ways of applying a margin of preference might be omitted.

83. Mr. SAHAYDACHNY (Secretariat) said that the intention was to give legislators an indication of the various possibilities in order to draw attention to the fact that the provision in article 29 (4) (d) would not be sufficient in itself and that detailed regulations might be needed.

84. Mr. WALLACE (United States of America) thought that a possibility would be merely to indicate in the Guide that "such matters might be dealt with further in the procurement regulations".

85. In reply to a question from Mr. PRIESTLEY (Observer for Australia), the CHAIRMAN said that the reference to paragraph 4 in the second sentence of paragraph 5 was a mistake; the reference should read "paragraph 2 of the comments to article 8".

86. He suggested that paragraph 5 be amended to refer to the "reasons for" a margin of preference, and that paragraph 6 be retained as an indication to legislators. He took it that the commentary on article 29 was adopted on that understanding.

87. It was so decided.

88. Mr. FRIES (United States of America), referring to the commentary on article 30, said that the concept of an "abuse of right" mentioned in the last sentence of paragraph 1 was not generally applicable in common law jurisdictions and he wondered how it would apply in other legal systems.

89. Mr. HERRMANN (Secretary of the Commission) noted that the text referred to an abuse of right or a violation of fundamental principles of justice. It had not been thought necessary to give an interpretation of those terms; it would not matter if one of the two alternatives did not apply in certain jurisdictions.

90. Ms. CRISTEA (Observer for Romania) said that there had been an example of an abuse of right in her country when three tenders had been submitted and all had been rejected because the procuring entity had wished to make some money and to pocket the tender securities on the pretext of covering costs. There was no law protecting tenderers in Romania, and protection was needed against the abuse of the right to reject tenders.

91. Mr. TUVAYANOND (Thailand) said that the notion of an abuse of right existed in many countries and there should be no problem in accommodating the concerns of all countries.

92. The commentary on article 30 was adopted.

93. Mr. WALLACE (United States of America), referring to the commentary on article 31, suggested the addition of a sentence to cover the point that had been made that another purpose served by prohibiting negotiation was to avoid unnecessarily high prices. Bidders who believed they would be subject to negotiation would artificially inflate their prices to anticipate being driven down in price later.

94. The CHAIRMAN took it that the text could be adopted on the understanding that that point would be reflected.

95. It was so decided.

96. Mr. WALLACE (United States of America), referring to the commentary on article 32, asked the Secretariat to consider redrafting the third, fourth and fifth sentences of paragraph 3. Article 32 dealt solely with the question whether a contract entered into force on notice of acceptance or later, whereas the question of the completeness of the contract was dealt with elsewhere. The present text seemed to confuse those two points. In paragraph 6, he suggested that the words "should be" in the penultimate line be changed to "shall be".

97. The CHAIRMAN took it that the text was adopted on the understanding that those points would be taken into account.

98. It was so decided.

99. Mr. WALLACE (United States of America), referring to the introduction to the commentary on chapter IV, asked whether the word "incorporate" in the third sentence meant "incorporate in the Model Law". If so, the sentence should be made more explicit.

100. The CHAIRMAN said he took it that the text could be adopted on that understanding.

101. It was so decided.

102. The CHAIRMAN drew attention to the commentary on article 33 and said that, if he heard no objections, he would take it as adopted.

103. It was so decided.

104. Mr. FRIES (United States of America), referring to the commentary on article 34, said that the last sentence of paragraph 2 referred rather casually to a potential extra burden for the procuring entity at a time when it was already busy as a reason for not using a wider notification procedure. It might be better to refer to "important administrative difficulties", or something of that nature.

105. The CHAIRMAN said he took it that the text could be adopted on the understanding that that comment would be taken into account.

106. It was so decided.

107. Mr. JAMES (United Kingdom), referring to the commentary on article 35, noted the reference in paragraph 1 to the article being a "skeleton provision". The real point was that the advantage of competitive negotiation was its flexibility, and the provisions in article 35 were as comprehensive as it was appropriate to make them. To call the article a skeleton provision would give the incorrect impression that it should be supplemented by additional regulations.

108. Mr. WALLACE (United States of America) thought that paragraph 3 should also be changed, since the Model Law was to be amended to include a reference to "best and final offers". If such a reference were inserted in paragraph 3, a good deal of the illustrative detail in the paragraph could be dropped.

109. The CHAIRMAN took it that the text could be adopted on the understanding that those comments would be taken into account.

110. It was so decided.

111. Mr. KOMAROV (Russian Federation), referring to the commentary on article 36, recalled that, during the discussion on the article it had been agreed that it would be useful to indicate in the Guide that the procurement entity might use internationally recognized terminology systems such as INCOTERMS.

112. Mr. WALLACE (United States of America) noted that the descriptions under both articles 36 and 37 were minimal. It would be useful for the Guide to include a description in lay language of the seven or eight procurement methods covered by the Model Law in order to ensure that legislators were adequately informed.

113. Mr. PRIESTLEY (Observer for Australia) said he understood that single-source procurement would be subject to article 11 on record requirements and the proposed article 11 bis on the publication of notices of awards; attention should be drawn to those articles under article 37.

114. Mr. JAMES (United Kingdom) felt that it did not do justice to the Model Law to say in article 37 that the reason it did not contain procedures to be followed in single-source procurement was that that method was to be used only in exceptional cases. It had been thought inappropriate to specify procedures because there was no need for the Law to regulate what amounted to a contractual negotiation between the procuring entity and one person. The second sentence should be redrafted.

115. Mr. SAHAYDACHNY (Secretariat), replying to a point raised by Ms. CRISTEA (Observer for Romania), said that the Guide should make clear that the general provisions of the Model Law, where relevant, would be applicable to single-source procurement, so that there was not a total void as far as that procedure was concerned.

116. The CHAIRMAN took it that the commentaries on articles 36 and 37 could be adopted subject to those comments.

117. It was so decided.

118. Mr. FRIES (United States of America), referring to the introduction to the commentary on chapter V, noted that paragraph 7 mentioned that chapter V did not deal with possibilities of dispute resolution through arbitration since the types of situation contemplated did not lend themselves to arbitration. That suggested a more general point which could be elaborated, either in the introduction to the commentary on chapter V or elsewhere, that the Model Law was addressed to contract formation and not to all the issues of contract implementation or administration, including the important one of dispute resolution concerning issues of contract performance.

119. Mr. KOMAROV (Russian Federation) said that it would be useful to add that resolution by arbitration of conflicts between the procuring entity and the contractor was not excluded by the Model Law if it was not prohibited by international laws and treaties.

120. Mr. WALLACE (United States of America) said that arbitration had not been covered during the drafting of the protest provisions. If it was to be said that arbitration was not excluded, it should be made clear that the reference was to circumstances where its use was appropriate. It had been deliberately decided not to make explicit reference to arbitration in the Model Law. The wording of any reference in the Guide should be careful and precise.

121. Mr. KOMAROV (Russian Federation) said that, should a dispute arise, the contractor and the procuring entity should not be deprived of the possibility of concluding an arbitration agreement to resolve it. A reference in the commentary to the existence of such a possibility would be useful.

122. Mr. TUVAYANOND (Thailand) said that in real life resort to arbitration in the matters under discussion was inconceivable. A settlement by arbitration was possible only in the case of a breach of contractual obligation and with the consent of all parties to the dispute. Paragraph 7 was appropriately worded as it stood.

123. The CHAIRMAN said that everyone's concern seemed to be covered in paragraph 7 as it stood.

124. The introduction to the commentary on chapter V was adopted.

125. Mr. WALLACE (United States of America), referring to the commentary on article 38, said that in the second sentence of paragraph 1 the words "as such" could be deleted. The drafting of the third sentence should be looked at. Lastly, the language used in the penultimate sentence of paragraph 1 was less specific than the language adopted for article 38 of the Model Law. It was risky to attempt to paraphrase the Model Law in the Guide and perhaps change the concepts. It was also misleading to refer to "other issues relating to the capacity of the supplier", as though the question of suffering loss or injury related to "capacity", which was a technical term. It might be better to say "other issues, for example those relating to the capacity ...".

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126. Referring to the commentary on article 39, he suggested that the phrase "to ensure that grievances are filed and resolved" in paragraph 3 be amended to read "to ensure that grievances are promptly filed". In paragraph 8, the last sentence should be expanded so as to make clear to the legislator what paragraphs (4) and (5) of article 39 contained.

127. Referring to the commentary on article 40, he suggested that the word "large" be deleted before the word "contract" in the second sentence of paragraph 12, since any contract entered into on the basis of fraud, whether large or small, should be subject to annulment.

128. Referring to the commentary on article 42, he said that the wording of paragraph 4 needed some redrafting, since the reference to an extension up to a "thirty-day total period" was not very clear.

129. Mr. JAMES (United Kingdom), referring to the commentary on article 42, said that there had been a long debate in the Working Group as to whether suspension of proceedings was appropriate: some had argued that, although it had some advantages, it militated against economy and efficiency. He suggested that paragraph 1 reflect that debate and make clear that the text adopted struck a balance between, on one hand, the need to give the supplier or contractor concerned the right of complaint and, on the other, the need to enable the procuring entity to proceed expeditiously, thus promoting economy and efficiency. It was important that that point be made clear to enacting States, since otherwise legislators might wonder why only fairly short time-limits had been provided for.

130. Mr. WALLACE (United States of America) said he could accept that the United Kingdom point should be taken into account, but urged that the Secretariat should take care not to upset the balance reflected in the article, which was the result of a hard-fought battle in the Working Group.

131. The CHAIRMAN took it that the section of the Guide dealing with articles 38 to 43 could be adopted subject to those comments.

132. It was so decided.

133. Mr. WALLACE (United States of America) said that he would like to make some comments on the Introduction to the draft Guide. The Introduction was in some ways akin to an executive summary of a substantial report, and was thus of great importance. His delegation believed that it should be further recast, since it did not give sufficient emphasis to some of the Model Law's most important features. In many ways, the Model Law represented significant progress: for example, it took as its norm international procurement open to contractors and suppliers from all countries, it contained review provisions which had been the subject of much discussion, and were not known in all legal systems, and it provided for various procedures for record-keeping and rights of complaint for aggrieved bidders. Those points should be given more prominence in the Introduction.

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134. The section on administration of procurement (paragraphs 12-16) could be made somewhat more concentrated. His delegation would be glad to submit some suggestions in writing as to how that section could be reformulated.

135. In his delegation's view, the Introduction should try to encapsulate just what it was that the Guide to Enactment sought to do - a matter that had been deliberated at length in the Working Group. For example, it had been pointed out that the Guide could serve as a means of helping executive authorities in States to prepare a section-by-section analysis of the Model Law, indicating to the legislator what policy choices had been made in the course of its preparation. The term "background information" in the second sentence of paragraph 5 was perhaps insufficiently forceful.

136. The CHAIRMAN took it that the Commission wished to adopt the Guide subject to the points raised in the discussion.

137. It was so decided.

138. Mr. WALLACE (United States of America) said his delegation would be pleased to send in to the Secretariat comments and suggestions on the drafting of the Guide, and hoped other delegations would do likewise. Such suggestions would not concern points of substance. Although the Guide had now been adopted, it would be useful for States to have an opportunity to comment on it again once the revised version had been prepared by the Secretariat and circulated to Member States.

139. Mr. MORAN BOVIO (Spain) said that, as he understood it, it had been agreed that, once work on the Guide was completed, delegations could submit any written comments they might have, so that the text could be further improved. He did not think that would in any way affect the decision just taken to adopt the Guide.

140. Mr. LEVY (Canada) said he was not happy with the turn the discussion was taking. The Secretary had already made it clear that, if the Commission were to adopt the Guide now, it would be on the basis that comments already made were to be taken into account and the text reworded accordingly. His delegation had great difficulty with the suggestion that the Secretariat would have to revise the Guide a second time on the basis of written comments submitted after the Guide had been adopted. That would mean that the Commission had in effect not adopted the Guide, and was simply continuing to work on it, which was quite unacceptable to his delegation.

141. The CHAIRMAN stressed that the Commission had adopted the Guide. Comments would be submitted in the context of that decision.

142. Ms. PIAGGI-VANOSSI (Argentina) said she thought that the procedure to be followed had been agreed the previous day. However, in the light of the points that had been made, it might be decided to allow comments to be submitted subsequently.

143. Mr. LEVY (Canada) said it was not clear to him whether, once the Secretariat had incorporated into the text of the draft Guide comments submitted by Governments, the Guide would become final.

144. Mr. BURMAN (United States of America) said his delegation did not share the concern expressed. The procedure proposed was a perfectly proper one, which had been used by the Commission in the past when it had approved a document to which final adjustments still needed to be made. It would not be reasonable to expect the Secretariat to have a fully revised text ready before the end of the session, and the document that had just been considered was clearly not the final version. The text would not be final until after the Secretariat had circulated its revised text for comment by Governments.

The meeting rose at 12.40 p.m.